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Lawyer's Fees Part Two: Tough to Split

California Joan explains a recent Supreme Court decision on sharing fees and quantum meruit recovery

By ELLEN R. PECK

"Cali, I've been trying to get back to you for a month about the lawyer fee splitting thing!" Sam Solo's gravelly voice boomed over the telephone to California Joan, his ethics attorney, in late December. "Last month you told me that *Chambers v. Kay* (2002) 29 Cal.4th 142, 56 P.3d 645, 126 Cal.Rptr.2d 536 *(*"*Chambers*") holds that unless I am an associate or partner of a law firm or a shareholder of a law corporation, I am not going to be able to enforce a fee-splitting or referral fee agreement with another lawyer without compliance with rule 2-200, Rules of Professional Conduct. You told me that *Chambers* rejected enforcement of such agreements where co-counsel from different firms asserted that they were 'partners' or 'joint venturers' on a single case and that the *Sims v. Charness* theory that one non-employee co-counsel could be an 'associate' of another had been disapproved (*Chambers*, at pp.150-155). Is that about it?" Sam asked.

"That's most of it, Sam. I bet you have more questions," Cali probed.

Substantial compliance with rule

"I've got another theory! In the cases in which I have a fee-splitting agreement with co-counsel on a case, I sent a confirming letter to my co-counsel setting forth the terms of our fee-splitting agreement. In every case, I sent a copy to the affected client and no client has objected to my fee-splitting arrangement. I think I have substantially complied with the rule since I have disclosed the terms of the fee division in writing; the fees will not be increased due to the fee split since I will share co-counsel's contingent fee and since the client has not objected! Can I enforce these agreements on a substantial compliance theory?" Sam asked hopefully.

"Sorry, Sam," Cali tried to soothe Sam in delivering more bad news. "*Chambers* observed, in similar circumstances, that the lawyer had failed to prove that the client's failure to object signified client consent, oral or written (*Chambers*, at p. 156). *Chambers* declined to overlook the written client consent provision. *Chambers* stressed the importance of compliance with rule 2-200's provision for written client consent following written disclosure of any fee-splitting agreement (1) to discourage disagreement between counsel which might result in disputes or litigation which may impact clients in a negative manner; (2) to discourage changes in fee agreements during pendency of cases; (3) to avoid later client claims that there was no consent; and (4) to ensure adequate communication to the client of the significant event: fee-splitting between co-counsel (*Chambers*, at pp.156-157). Finally, *Chambers* rejected the 'substantial compliance' theory, stating: 'Were we to hold that the fee . . . may be divided . . . with no indication that the required [written] client consent was either sought or given, we would, in effect, be both countenancing and contributing to a violation of a rule we formally approved in order 'to protect the public and to promote respect and confidence in the legal profession.' [Citations omitted.] Such a result would be untenable as well as inconsistent with the policy considerations that motivated the adoption of rule 2-200'" (*Chambers*, at p.158).

"Cali, I'm confused! The fourth paragraph of rule 1-100(A) specifies that the Rules of Professional Conduct are not intended to create new civil causes of action and that nothing in the rules shall be deemed to create, augment, diminish or eliminate any non-disciplinary consequences of violating a duty within the rules. Isn't rule 2-200 being used impermissibly to create a new affirmative defense to my meritorious breach of contract action?" asked Sam.

"*Chambers* said 'No!'" answered Cali. "Rule 1-100(A)'s provisions are not applicable to your potential breach of contract action. Using 2-200 as a defense is not the same as asserting a civil cause of action against you for lack of rule 2-200 compliance or asserting that this failure created a substantive legal duty that gives rise to a recovery.

"Secondly, since the Supreme Court approved the Rules of Professional Conduct, the courts should not aid lawyers in achieving fee-splitting in the civil courts in violation of the rule when the same conduct could subject someone to professional discipline" (*Chambers*, p.161).

"Cali, on cases where there is no rule 2-200 compliance and I have done work, can I enforce the agreements on a quantum meruit theory? In those cases, it is only fair that I get the reasonable value of my services and can't the reasonable value be calculated consistent with the attorney's agreement for fee-splitting?" Sam asked hopefully.

"Sam, let me answer this in two parts. First: Is quantum meruit recovery permitted in the absence of rule 2-200 compliance? Second, if so, are there any ethical limitations concerning calculation of the amount of quantum meruit recovery?" Cali broke down Sam's question.

"Regarding the second question, *Chambers* held that there is 'no legal or policy justification for finding that the fee the parties negotiated without the client's consent furnishes a proper basis for a quantum meruit award.' In other words, in the absence of rule 2-200 compliance, the reasonable value of your services cannot be equal to the fee-splitting deal you struck," Cali asserted (*Chambers*, p. 161-162).

"The question of whether you can obtain the reasonable value of your services in the absence of rule 2-200 compliance is more complicated and I have no definitive answer," Cali went on.

"*Chambers* affirmed the appellate court ruling holding that an attorney who had not complied with rule 2-200 was entitled to recover in quantum meruit for the reasonable value of the legal services provided before discharge from the underlying case because that ruling was not before them. The Supreme Court noted that Mr. Kay, the lawyer asserting that he had no duty to pay the reasonable value of Mr. Chambers' services before discharge, had not petitioned for review of the Court of Appeal ruling to the contrary and that he had forfeited these issues."

Sam interjected happily, "So, since the Supreme Court did not reverse the quantum meruit claim, I can recover for the reasonable value of my services?"

Unresolved quantum meruit issue

"Sam, I can't give you the green light because I'm not certain that the issue is resolved. On July 24, 2002, the California Supreme Court granted review in *Huskinson & Brown v. Wolf* (2002) 119 Cal.Rptr.2d 479 [superceded]. *Huskinson & Brown v. Wolf* involved a referral arrangement in which the referred client did not give written consent to payment of the referral fee by the referred firm. The Court of Appeal held that the referring firm could not recover a referral fee because that would be unjust enrichment for conduct in violation of the rules. It also held that the referring firm could not recover the reasonable value of its attorney's fees for services provided or expenses paid. Until the California Supreme Court rules on this case, it is not completely clear that quantum meruit for legal work performed may be recovered in the absence of compliance with rule 2-200," Cali stated cautiously.

"But, if you take the risk and try to enforce your quantum meruit rights under a common count cause of action, be careful who you sue. You may not be able to sue the client for the reasonable value of your services," Cali went on.

"*Carroll v. Interstate Brands Corp.* (2002) 99 Cal.App.4th 1168, 1172, 121 Cal.Rptr.2d 532 observed that when a client enters into a retainer agreement with one particular attorney, a lien in favor of another associated attorney is neither express nor implied and does not exist. There-fore, associated counsel must look to the client's attorney for compensation, not to the client."

"*Trimble v. Steinfeldt* (1986) 178 Cal.App.3d 646, 651-652, 224 Cal.Rptr. 195, 197-198 held that even if a client agrees in a fee agreement that an attorney may associate another lawyer, the client is personally liable for the associated lawyer's fee share only if the client explicitly consented to pay the associated attorney's fee. Otherwise, the associated lawyer's claim for fees may be directed only against the hiring attorney that the client retained and not against the client."

"There must be something I can do to enforce the agreements I have with my fellow lawyers," Sam howled.

"Sam, wake up and smell the coffee! Even if you did not want to be in compliance with rule 2-200 as a matter of professional and ethical conduct, which I know you do because you would not have otherwise called me, look at the practicalities," Cali said emphatically.

"In the past three years there have been a host of published California appellate decisions and substantially more unpublished appellate decisions in which one lawyer uses the failure to comply with rule 2-200 as an abso-lute defense to paying a previously agreed referral fee or fee split for work performed. As a practical matter, lawyers are using non-compliance with the rules to get out of these non-complying fee-splitting deals and courts cannot otherwise enforce them. Even lawyers who might want to honor their prior deals may feel compelled to refuse because the heightened focus on compliance may put them at risk of discipline or other civil liabilities!

"Practically speaking, unless you comply with rule 2-200, at best, you may be able to obtain quantum meruit, at some cost of recovery," Cali finished.

Sam capitulated. "All right, I know when I'm hammered. But isn't it too late to comply with rule 2-200?" Sam asked

dejectedly.

"No, Sam, that's the good news," Cali said promisingly. "Los Angeles County Bar Association Formal Opinion 467 stated that "it is preferable that the client's written consent be given prior to entering into" a fee-splitting agreement. However, the opinion noted that there is nothing in rule 2-200 to indicate that the consent of the client must be prior to the representation or at the time of the fee-division agreement. Therefore, compliance with the rule may occur at any time before a division of fees is made.

"Sam, you have an opportunity to approach all counsel with whom you may have fee division agreements and attempt to obtain compliance with rule 2-200 by making a written disclosure to the affected clients of the terms of the fee-splitting arrangement and by obtaining the clients' written consent to the arrangement. Of course, you know that the total fee to the client cannot be increased solely by reason of the fee division," Cali suggested.

"I know that this is a bit of work, but it is certainly cheaper and more efficient than suing every lawyer for quantum meruit. Moreover, if some of the lawyers are not cooperative, you still may have a quantum meruit theory," Cali added.

"Yes, that really is something that I can do," Sam conceded with a sigh. "But, what about the future?"

"Again, be practical and protect your hard work. First, do not agree to serve as associated counsel without compliance with rule 2-200 at the outset. Most of my clients who have rule 2-200 agreements find that clients will consent to the fee-splitting arrangements between their lawyers as long as nothing more comes out of their pockets. Second, if you make a referral of a client to another lawyer and reach an agreement regarding a referral fee, undertake compliance with rule 2-200 yourself. Do not rely on the referred lawyer to do it since that lawyer may fail to do it or have no incentive to comply with rule 2-200," Cali recommended.

"Do you know of any forms that I could use to make my compliance with rule 2-200 easier?" Sam asked.

"Sam, see Rutter, Cal. Practice Guide: Prof. Responsibility, (1997) Ch. 5 FORM 5-L. This is a very simple set of forms for a standard fee division or referral fee which you can change to suit your practice and your circumstances," Cali responded.

In concluding their telephone conference, Sam said, "Cali, I want to do the right thing and comply with the rules. I am gratified that it is easier to comply than pursue other remedies. Moreover, my practical, business sense indicates that future compliance with rule 2-200 is the best way to keep clients informed of the efforts I make in their cases and to ensure that my agreements with other lawyers are enforceable should I have the need."

■ *Ellen Peck is a former judge of the State Bar Court, a past chair of the State Bar's Committee on Profession-al Responsibility and Conduct and a member of the Commission to Revise the Rules of Professional Conduct. A private practitioner in Escondido, she is a visiting professor at Concord University School of Law, where she teaches professional responsibility, and is a co-author of The Rutter Group's California Practice Guide — Professional Responsibility.*

Test — Legal Ethics
1 Hour MCLE Credit

1. Rule 2-200 requires that partners and associates within law firms must obtain the written consent of their clients concerning any division of fees between them.

2. Lawyer may enforce a fee-splitting agreement by showing that a client received a letter outlining a fee-splitting arrangement agreed to with Attorney; that the client did not object in lieu of having the written consent of the client as required by rule 2-200.

3. *Chambers* rejected enforcement of lawyer fee-splitting agreements where co-counsel from different firms asserted that they were "partners" or "joint venturers" on a single case without compliance with rule 2-200.

4. Rule 2-200's provision for written client consent following written disclosure of any fee splitting agreement discourages disagreement between counsel which might result in disputes or litigation which may impact clients in a negative manner.

5. Written client consent to a fee division helps lawyers because it prevents later client claims that there was no consent.

6. Sending a client a written disclosure of the terms of a fee division and obtaining the client's written consent is important to ensuring adequate communication to the client of the significant event.

7. The Rules of Professional Conduct are not intended to create new civil causes of action and nothing in the rules shall be deemed to create, augment, diminish or eliminate any non-disciplinary consequences of violating a duty within the rules.

8. Rule 1-100(A) is not applicable to a defense to a breach of contract action for failure to honor a fee division not in compliance with rule 2-200 because there is no assertion of a civil cause of action for failure to comply with rule 2-200.

9. Even though the Supreme Court approved the Rules of Professional Conduct, the courts can assist lawyers in achieving fee-splitting in the civil courts even though that same conduct might subject someone to professional discipline.

10. Quantum meruit fees, in the absence of compliance with rule 2-200, may be calculated consistent with the attorney's agreement for fee-splitting.

11. Whether an attorney may obtain the reasonable value of his/her services prior to discharge even though there has been no compliance with rule 2-200 has not yet been squarely decided by the California Supreme Court.

12. When a client enters into a retainer agreement with one particular attorney, an express lien is created in favor of another lawyer associated by that attorney.

13. When a client enters into a retainer agreement with one particular attorney, an implied lien is created in favor of another lawyer associated by that attorney.

14. Associated counsel that have no lien on a recovery for attorney's fees must look to the client's attorney for compensation, not to the client.

15. Where Client agrees in a fee agreement that Attorney X may associate another lawyer to assist in the handling of her case, Client is personally liable for the associated lawyer's fee share only if the client explicitly consented to pay the associated attorney's fee.

16. Client hires Attorney Z to represent him in a sexual harassment action. Attorney Z's fee agreement contains no provision for retaining other lawyers to perform legal services for Client. Attorney Z retains outside Lawyer Y to conduct legal research, prepare pleadings and to prepare and respond to discovery for 10 percent of Attorney Z's fees. Client does not know that Y is working on the case and Y never appears as "of record" in the case. After one year, Z fires Y. After Z recovers a $3 million settlement on behalf of Client, Y may maintain an action against Client for the reasonable value of his services.

17. Compliance with rule 2-200 has a practical benefit to a lawyer who seeks to collect a referral fee from a referred attorney because the agreement will not be rendered unenforceable on public policy grounds.

18. It is preferable that the client's written consent be given prior to entering into a fee-splitting agreement between lawyers.

19. It is required that the client's written consent be given prior to entering into an agreement between lawyers for payment of a referral fee to a referring lawyer.

20. There is nothing in rule 2-200 to indicate that the consent of the client must be prior to the representation or at the time of the fee-division agreement. Therefore, compliance with the rule may occur at any time before a division of fees is made.

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TEST #35 — Lawyer's Fees Part Two: Tough to Split

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